

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SERGE VOILLAT and SIMONE VOILLAT,  
individually and as successors-in-interest to  
LIONEL VOILLAT,

No. C 03-3016 MHP

Plaintiffs,

v.

**AMENDED  
MEMORANDUM AND ORDER  
Motion to Dismiss and to Strike**

RED AND WHITE FLEET, FISHERMAN'S  
WHARF BAY CRUISE CORPORATION d/b/a  
RED AND WHITE FLEET, GOLDEN GATE  
SCENIC STEAMSHIP CORPORATION, LON  
RICHARDS, LOU'S BLUE SNAX, INC.,  
JOHNNY BRETT and KEITH O'REILLY, both  
individually and d/b/a "OBLIVION,"  
"OBLIVIONSF," and/or "OBLIVIONSF.COM,"  
SPECIALIZED SECURITY ENTERPRISES,  
WILLIAM O. MONAGHAN, and DOES 1-50,  
inclusive,

Defendants.

On October 26, 2002, plaintiffs' decedent, Lionel Voillat, died after allegedly being thrown overboard from the M/V Royal Prince ("Royal Prince") by defendant William O. Monaghan during a cruise in the San Francisco Bay. On June 27, 2003, decedent's parents, plaintiffs Serge and Simone Voillat, brought this wrongful death and survival action against Red and White Fleet, Fisherman's Wharf Bay Cruise Corporation d/b/a Red and White Fleet (collectively "Red and White Fleet"), Golden Gate Steamship Corporation, Lon Richards, Lou's Blue Snax, Inc., Johnny Brett and Keith O'Reilly, individually

1 and d/b/a “Oblivion,” OblivionSF,” and “OblivionSF.com” (collectively “Oblivion”), Specialized Security  
2 Enterprises, William O. Monaghan, and Does 1-50. In substantial part, plaintiffs’ complaint alleges that  
3 defendants, with the exception of Monaghan, were negligent in failing to adequately inspect, maintain, and  
4 repair the vessel; improperly operating the vessel; providing inadequate security on board; knowingly hiring  
5 individuals who inadequately performed their job functions and inadequately supervising those individuals;  
6 and serving alcohol to an obviously intoxicated passenger (“dram shop liability”). For these alleged  
7 violations, plaintiffs seek compensatory damages for prejudgment loss of wages, future loss of earning  
8 capacity, loss of support, loss of services and funeral expenses, and punitive damages.

9 This case is properly before this court pursuant to its admiralty jurisdiction. See 28 U.S.C. § 1333.  
10 Now before the court is defendants’ motion to dismiss the survival and dram shop liability claims for failure  
11 to state a claim under Federal Rule of Civil Procedure 12(b)(6), or in the alternative, to strike portions of  
12 plaintiffs’ prayer for relief under Federal Rule of Civil Procedure 12(f). The court has considered the  
13 parties’ arguments fully, and for the reasons set forth below, the court rules as follows.

14  
15 BACKGROUND<sup>1</sup>

16 On October 26, 2002, the Royal Prince set out for a cruise on the San Francisco Bay. Defendants  
17 John Brett d/b/a Oblivion and Keith O’Reilly had chartered the Royal Prince on September 11, 2002, for  
18 the October 26, 2002, cruise. Defendants Red and White Fleet and Golden Gate Scenic Steamship  
19 Corporation owned, operated and maintained the Royal Prince. On the evening of the cruise, Lon  
20 Richards was the Royal Prince’s master and skipper; Lou’s Blue Snax served alcohol; and Specialized  
21 Security Enterprises provided security. Voillat purchased a ticket and attended the cruise. During the  
22 course of the cruise, Monaghan, a fellow passenger, allegedly threw Voillat overboard into the San  
23 Francisco Bay. Voillat was pronounced dead on November 14, 2002. See Pls.’ Offer of Proof and  
24 Conditional Request for Discovery, ¶ 7.

25 On November 17, 2003, defendants Red and White Fleet, Golden Gate Scenic Steamship  
26 Corporation, and Lon Richards filed a motion to dismiss the survival action and the sixth claim for improper  
27 service of alcohol for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P.  
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1 12(b)(6). Alternatively, defendants request the court to strike those portions of plaintiffs' prayer for relief  
2 relating to pre-death pain and suffering, lost future earning capacity and punitive damages. See Fed. R.  
3 Civ. P. 12(f). On November 21, 2003, Lou's Blue Snax, John Brett d/b/a Oblivion and Keith O'Reilly  
4 filed motions to join their co-defendants' motion to dismiss.

5  
6 LEGAL STANDARD

7 1. Motion to Dismiss

8 "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."  
9 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (internal quotation marks omitted). Such  
10 dismissal is only proper in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th  
11 Cir. 1981). A motion to dismiss will be denied unless it appears beyond doubt that the plaintiff can prove  
12 no set of facts which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957);  
13 Parks Sch. of Bus. Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); Fidelity Fin. Corp. v. Federal  
14 Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the  
15 complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Indus., Inc. v.  
16 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of  
17 the allegations in the pleadings, when the complaint is accompanied by attached documents, such  
18 documents are deemed part of the complaint and may be considered in determining whether dismissal is  
19 proper without transforming the motion to one for summary judgment. See Durning v. First Boston Corp.,  
20 815 F.2d 1265, 1267 (9th Cir. 1997); Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d  
21 1542, 1555 n.19 (9th Cir. 1989).

22  
23 2. Motion to Strike

24 Federal Rule of Civil Procedure 12(f) permits a court to strike from any pleading "any insufficient  
25 defense or any redundant, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Striking a portion of  
26 a pleading is a drastic remedy, and as such, it is a remedy to be used only when the interests of justice so  
27 require. See Augustus v. Bd. of Public Instruction, 306 F.2d 862, 868 (5th Cir. 1962). A motion to strike  
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1 may be used to strike a prayer for relief where the damages sought are not recoverable as a matter of law.  
2 See Tapley v. Lockwood Green Engineers, Inc., 502 F.2d 559, 560 (8th Cir. 1974); Bureerong v.  
3 Uvawas, 922 F. Supp. 1450, 1479 (C.D. Cal. 1996).

4  
5 DISCUSSION

6 Defendants request that the court dismiss plaintiffs' general maritime law survival action and  
7 plaintiffs' sixth claim for improper service of alcohol ("dram shop liability") for failure to state a claim upon  
8 which relief can be granted. Alternatively, to the extent the court finds that plaintiffs are entitled to assert a  
9 general maritime law survival action, defendants request that the court apply California's survival statute and  
10 strike those portions of the prayer for relief which seek pre-death pain and suffering, lost future earning  
11 capacity, and punitive damages because they are unavailable to plaintiffs as a matter of law. The court will  
12 address each in turn.

13  
14 I. Motions to Dismiss

15 The crux of defendants' argument is that no general maritime action exists for either survival or  
16 dram shop liability. Defendants argue that in the absence of a general maritime survival action the court  
17 should dismiss plaintiffs' survival claim entirely. Defendants also argue that in the absence of a general  
18 maritime dram shop liability rule the court should apply California state law, which would immunize  
19 defendants from liability. See Cal. Bus. & Prof. Code § 25602.

20 A. General Maritime Survival Action

21 The first question before this court is whether plaintiffs can maintain a general maritime survival  
22 action.<sup>2</sup> Plaintiffs argue that Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985) ("Evich I"), which  
23 recognized a general maritime survival action, is still good law. Defendants, by contrast, argue that the  
24 Supreme Court overruled Evich I in Miles v. Apex Marine Corporation, 498 U.S. 19 (1990) (holding that  
25 a deceased's survivors could not supplement their Jones Act remedies with general maritime survival  
26 action). In Sutton, the Ninth Circuit held that Miles did not overrule Evich I's recognition of a general  
27 maritime survival action. Sutton v. Earles, 26 F.3d 903, 919 (9th Cir. 1994). Rather, plaintiffs may bring a  
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1 general maritime survival action where no applicable federal statute would otherwise limit their recovery.

2 Id. As the Ninth Circuit stated in Sutton:

3 We do not consider the vitality of Evich as applied in the circumstances of this case to have  
4 been called into doubt by the Supreme Court's holding [in Miles] . . . the Court clearly  
5 rested its decision in Miles on the existence of the Jones Act's limitation on remedies—a  
6 limitation not present in this case. . . . Not only does Miles fail to undermine Evich, much  
7 of the Court's discussion indicates approval of Evich, at least in cases not involving the  
8 death of seamen or death on the high seas.

8 Id. Since Sutton, the Ninth Circuit has continued to recognize general maritime survival actions. See  
9 Koirala v. Thai Airways International, Ltd., 126 F.3d 1205, 1212 (9th Cir. 1997) (holding that a deceased  
10 non-seaman's estate could assert a general maritime survival action); Davis v. Bender Shipbuilding and  
11 Repair Co., 27 F.3d 426, 430 (9th Cir. 1994) (holding that a general maritime survival claim may be  
12 pursued for the death of a non-seaman in state territorial waters so long as there was no federal wrongful  
13 death statute imposing a damages limitation). The Supreme Court also appears to agree with the Ninth  
14 Circuit's recognition of a general maritime survival action in such cases. See Yamaha Motor Corp. v.  
15 Calhoun, 516 U.S. 199, 211 (1996) ("[W]e assume without deciding that Moragne[v. States Marine  
16 Lines, Inc., 398 U.S. 375 (1996)] also provides a survival action."). None of the applicable federal  
17 maritime statutes that could potentially limit plaintiffs' recovery apply to Voillat because he was neither a  
18 seaman nor a maritime worker, and the incident occurred within state territorial waters.<sup>3</sup> Plaintiffs properly  
19 state a claim for relief under a general maritime survival action.

20 B. Dram Shop Liability

21 The second question before this court is whether this court should recognize a general maritime  
22 dram shop rule or, conversely, apply California's anti-dram shop provision. Defendants contend that no  
23 general maritime dram shop rule exists, as recognized by this court in Meyer v. Carnival Cruise Lines, Inc.,  
24 No. C-93-2383, 1994 WL 832006, at \*4 (N.D. Cal. Dec. 29, 1994) (Patel, J.). They argue that in the  
25 absence of such a rule, California state law should apply and this court should dismiss plaintiffs' dram shop  
26 claim. According to plaintiffs, this court should recognize and apply a general maritime dram shop rule  
27 based on the Fifth Circuit's recognition of such a rule. See Reyes v. Vantage Steamship Co., Inc., 609  
28 F.2d 140, 146 (5th Cir. 1980).

1 Under California's dram shop statute, defendants are not liable for negligent service of alcohol.  
2 California's dram shop statute provides, in relevant part:

3 No person who sells, furnishes, gives or causes to be sold, furnished, or given away, any  
4 alcoholic beverage . . . shall be civilly liable to any injured person or the estate of such person  
5 for injuries inflicted on that person as a result of intoxication by the consumer of such  
6 alcoholic beverages.

7 Cal. Bus. & Prof. Code § 25602 (b). The statute immunizes providers of alcoholic beverages from liability  
8 for merely furnishing alcohol. Williams v. Saga Enterprises, Inc., 225 Cal. App. 3d 142, 148 (Cal. Ct.  
9 App. 1990). Statutory immunity extends to providers who serve alcohol to an individual who later injures  
10 someone else because of intoxication. See id. The only exception to the statute exists in cases in which a  
11 person has sold alcoholic beverages to an obviously intoxicated minor. Cal. Bus. & Prof. Code §  
12 25602.1. That exception does not apply in this case because neither party has alleged that either  
13 Monaghan or Voillat was a minor. In the absence of such an allegation, section 25602 precludes plaintiffs'  
14 dram shop claim.

15 California's anti-dram shop provision applies to this case. In Meyer, this court held that  
16 California's dram shop law governed in a general maritime case. 1994 WL 832006, at \*4. Meyer was  
17 seriously injured when she and another passenger were playing on and sliding down the stairway railing of a  
18 Carnival cruise ship. Id. at \*1. Both Meyer and the other passenger had been drinking. Id. Meyer  
19 alleged that the other passenger unintentionally pushed her over the railing, causing her to fall and sustain  
20 serious injuries. Id. She sued Carnival, arguing that the company was negligent in serving alcohol to the  
21 other passenger when it knew or should have known that he was intoxicated. Id. Carnival contended that  
22 California's dram shop law applied to the case, immunizing the company from liability. Id. at \*3. The court  
23 declined to fashion its own general maritime dram shop rule, concluding that California's anti-dram shop  
24 provision should apply in the absence of a federal maritime dram shop rule. Id. at \*4. ("Because extensive  
25 research has uncovered no federal maritime dram shop rule, the court finds that California's dram shop law  
26 applies under Wilburn." ) (citing Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310  
27 (1955)).<sup>4</sup>  
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1 Since Meyer, the Ninth Circuit has not adopted a general maritime dram shop rule. The court  
2 declines to fashion its own rule because doing so would require the court to engage in the difficult task of  
3 choosing among various competing state regulatory approaches. Such regulatory power is more  
4 appropriately left to the states. See Wilburn, 348 U.S. at 313. Under California law, plaintiffs fail to state  
5 a claim for relief under their sixth claim for improper service of alcohol.

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7 III. Motion to Strike

8 Defendants ask the court to strike portions of plaintiffs' prayer for relief because certain remedies  
9 are unavailable as a matter of law. According to defendants, if the court chooses to recognize a general  
10 maritime action, the court should apply California state law. Defendants argue that California law would  
11 bar recovery of damages for pre-death pain and suffering, damages for lost future earning capacity, and  
12 punitive damages.<sup>5</sup> The court will address each damages request in turn.

13 A. Pre-Death Pain and Suffering

14 Plaintiffs are entitled to seek damages for pre-death pain and suffering under a general maritime  
15 survival action. The Ninth Circuit has held as much, see Evich v. Morris, 819 F.2d 256, 258 (9th Cir.  
16 1987) ("Federal circuit courts considering survival damages have generally stated that pre-death pain and  
17 suffering is compensable.") ("Evich II"), and Miles did not overrule or otherwise modify this portion of  
18 Evich II. Miles, 498 U.S. at 36; In re Air Crash Disaster Near Honolulu, Hawaii on February 24, 1989,  
19 783 F. Supp. 1261, 1265 (N.D. Cal. 1992) (Walker, J.); Newhouse v. United States, 844 F. Supp. 1389,  
20 1394 (D. Nev. 1994). "Pre-death pain and suffering is also an element of most states' survival statutes."  
21 In re Air Crash Disaster Near Honolulu, 783 F. Supp. at 1265. A number of lower courts have also  
22 recognized a damages remedy for pre-death pain and suffering in a general maritime survival action.  
23 Newhouse, 844 F. Supp. at 1394 ("[T]he Court finds that Miles does not preclude recovery of pre-death  
24 pain and suffering . . . in a general maritime survival action."); Favaloro v. S/S Golden Gate, 687 F. Supp.  
25 475, 479 (N.D. Cal. 1987) (Patel, J.) ("In Evich v. Morris, the court recognized a general maritime survival  
26 action for pain and suffering and explicitly held that state law was not the source of the action, finding state  
27 law to be preempted by general federal maritime law."); In re Air Crash Off Point Mugu, California, 145 F.

1 Supp. 2d 1156, 1166 (N.D. Cal. 2001) (Legge, J.) (“In theory, a survival action recognizes the right of a  
2 victim’s estate to recover damages for his or her personal injuries *prior* to death.”). Plaintiffs are entitled to  
3 seek damages for pre-death pain and suffering.<sup>6</sup>

4 B. Lost Future Earning Capacity

5 Plaintiffs are not entitled to damages for both loss of support and lost future earning capacity,  
6 though they may seek one or the other. In Evich II, the Ninth Circuit explicitly recognized the recovery of  
7 lost future earnings in general maritime survival action where wrongful death beneficiaries do not exist. 819  
8 F.2d at 258 (“Most states and the Jones Act allow these damages to be recovered in the form of loss of  
9 support when wrongful death beneficiaries exist. Where, as here, those beneficiaries do not exist, potential  
10 problems with double recovery do not exist.”). Miles subsequently overruled Evich II, holding that a  
11 general maritime survival action could not supplement Jones Act claims. Miles, 498 U.S. at 35.

12 While the Jones Act does not apply in this case, the reasoning of the Miles Court is nonetheless  
13 persuasive. Noting the policy behind the refusal to allow recovery for lost future earnings, the Court stated,  
14 “[r]ecovery of lost future income in a survival suit will, in many instances, be duplicative of recovery by  
15 dependents for loss of support in a wrongful death action; the support dependents lose as a result of a  
16 seaman’s death would have come from the seaman’s future earnings.” Id. Since Miles, the Ninth Circuit  
17 has held that “where no wrongful death beneficiaries exist, the decedent’s estate can receive an award for  
18 loss of future earnings because in such cases, potential problems of double recovery in the form of loss of  
19 support awards to wrongful death beneficiaries do not arise.” Sutton, 26 F.3d at 919. In this case,  
20 plaintiffs bring both wrongful death and survival actions. They seek damages for both loss of support and  
21 lost future earnings. As wrongful death beneficiaries, plaintiffs are entitled to damages for loss of support.  
22 The support plaintiffs would receive as a result of their son’s death would have come from his future  
23 earnings. Were this court to allow plaintiffs to recover damages both for loss of support and lost future  
24 earning capacity, problems of duplicative recovery would arise.<sup>7</sup> Plaintiffs may not recover damages for  
25 both loss of support and lost future earning capacity in this action.

26 In their motion, defendants ask the court to strike plaintiffs’ request for lost future earning capacity.  
27 While problems of duplicative recovery may eventually arise, this matter is at a relatively early stage in the  
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1 litigation. The court will therefore leave this question open pending resolution of the wrongful death action.  
2

3 C. Punitive Damages

4 Plaintiffs are entitled to seek punitive damages. “Punitive damages are available under the general  
5 maritime law and may be imposed for conduct which manifests reckless or callous disregard for the rights  
6 of others or for conduct which shows gross negligence or actual malice or criminal indifference.” Churchill  
7 v. F/V Fjord, 857 F.2d 571, 579 (9th Cir. 1988) (internal quotation marks omitted). Punitive damages are  
8 also available in a general maritime survival action. Evich II, 819 F.2d at 258. “Nothing in Miles indicates  
9 that the Ninth Circuit’s holding in Evich II regarding the recovery of pre-death pain and suffering and  
10 punitive damages or prejudgment interest in a general maritime survival action is not still good law.”  
11 Newhouse, 844 F. Supp. at 1394; see also In re Air Crash Off Point Mugo, California, 145 F. Supp. at  
12 1166 (holding that punitive damages are available in a survival action based upon the death of a nonseafarer  
13 in state territorial waters). This court declines to strike plaintiffs’ request for punitive damages because such  
14 damages are available in a general maritime survival action.<sup>8</sup> Whether plaintiffs may eventually recover such  
15 damages is a question of fact.

16 CONCLUSION

17 For the foregoing reasons, the court DENIES defendants’ motion to dismiss plaintiffs’ general  
18 maritime survival action. The court GRANTS defendants’ motion to dismiss plaintiffs’ sixth claim for  
19 improper service of alcohol. This claim is dismissed without prejudice to any of the other claims that are  
20 properly asserted in this action or to any claims that may be asserted in state court. The court DENIES  
21 defendants’ motion to strike plaintiffs’ request for damages for pre-death pain and suffering, damages for  
22 lost future earning capacity, and punitive damages.  
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IT IS SO ORDERED.

Dated: March 18, 2004

/s/ \_\_\_\_\_  
MARILYN HALL PATEL  
Chief Judge  
United States District Court  
Northern District of California

ENDNOTES

1. Unless otherwise specified, facts are taken from plaintiffs' complaint.

2. A survival action differs from a wrongful death action in that it allows a deceased's estate to bring personal injury claims that the deceased would have had but for his death. Sea Land Services v. Gaudet, 414 U.S. 573, 576 n.2 (1974). In a survival action, the decedent's estate may recover damages suffered directly by the decedent, but not damages for harms suffered by the decedent's family. See id. Wrongful death actions, unlike survival actions, allow the decedent's family to recover losses suffered directly by them as a result of the decedent's death. Id. at 584.

3. The Death on the High Seas Act, 46 U.S.C. §§ 761 et. seq., provides a remedy for anyone killed outside of state territorial waters (i.e., beyond three nautical miles from shore); the Jones Act, 46 U.S.C. § 688, provides a remedy for deceased seamen; and the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901 et. seq., provides a remedy for deceased longshore and harbor workers and others involved in maritime-related work. Because Voillat was a nonseaman passenger on the vessel, and the incident occurred in state territorial waters, none of these statutes apply.

4. Wilburn concerned the issue of what law to apply in regard to construction of a marine insurance contract. 348 U.S. at 311-12. The Supreme Court held that in the absence of a federal admiralty rule regarding whether warranties applied to such contracts, state law should apply. Id. at 316. As the Wilburn Court stated, "[i]n the field of maritime contracts, as in the field of maritime torts, the National Government has left much regulatory power to the states." Id. at 313. Declining to choose among various state approaches in order to create a general maritime rule to govern insurance contracts, the Court chose to apply state law. Id. at 316.

5. Defendants' argument for the application of California state law to plaintiffs' general maritime survival claim relies on Yamaha, 516 U.S. at 199. In Yamaha, the Supreme Court held that state remedies

1 are available to nonseamen in state territorial waters. Id. at 216. The Court explicitly confined its inquiry to  
2 whether Moragne precluded plaintiffs from seeking relief under state law. Id. at 211, n.8. The Court  
3 concluded that “Moragne . . . centered on the extension of relief, not on the contraction of remedies.” Id.  
4 at 213. The holding in Yamaha does not limit plaintiffs’ request for relief under a general maritime survival  
5 action.

6 6. Plaintiffs would not be able to recover pre-death pain and suffering were the death to have  
7 occurred on the high seas because DOSHA would preclude such damages. See Saavedra v. Korean Air  
8 Lines, 93 F.3d 547, 550 (9th Cir. 1996). Because Lionel Voillat died in state territorial waters, however,  
9 DOHSA does not apply.

10 7. This result is also supported by DOHSA, the Jones Act, and California state law, all of which  
11 preclude recovery for future lost earnings in a survival action. See Miles, 498 U.S. at 35; Cal. Civ. Proc.  
12 Code § 377.20. “In only a few states can an estate recover in a survival action for income decedent would  
13 have received but for death.” Miles, 498 U.S. at 35.

14 8. Even if the court were to apply California’s survival statute, as defendants request, plaintiffs would  
15 still be entitled to seek punitive damages. See Cal. Civ. Proc. Code § 377.34 (“In an action or proceeding  
16 by a decedent’s personal representative or successor in interest on the decedent’s cause of action, the  
17 damages recoverable are limited to the loss or damage that the decedent sustained or incurred before  
18 death, including any penalties or punitive or exemplary damages that the decedent would have been entitled  
19 to recover had the decedent lived.”).